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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WARNER BROS. ENTERTAINMENT INC., Plaintiff and Appellant, v. ALAN LADD, JR., et al., Defendants and Respondents.	B208831 (Los Angeles County Super. Ct. No. SS016297)

APPEAL from an order of the Superior Court of Los Angeles County, John A. Kronstadt, Judge. Affirmed.

Weissmann Wolff Bergman Coleman Grodin & Evall, Michael Bergman, Steven Glaser and Julie B. Ephraim, for Plaintiff and Appellant.

Greenberg Traurig; Stroock & Stroock & Lavan, John M. Gatti and John J. Lucas, for Defendants and Respondents.

Warner Bros. Entertainment Inc. (WB) appeals from an order denying its petition to compel arbitration of its claim for breach of a settlement agreement. We find no error and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

According to the charging pleading, WB entered into a series of agreements with Alan Ladd, Jr., Jay Kanter, L-K Producers Corporation, Ketram Corporation, and Kanter Corporation (collectively respondents) in 1979. Under these agreements, respondents produced, and WB distributed, a number of motion pictures, including Blade Runner. In 1985, the parties entered into a termination agreement, under which WB became the sole owner of the motion pictures, but was obligated to account to respondents for their profit participation interest in the revenues derived from distribution films.

In 1993, respondents conducted a profit participation audit of the motion pictures for the period from October 1, 1988 through September 30, 1992. As a result of the audit, the parties entered into the 1996 settlement agreement and release. Under the settlement agreement, the parties released "all claims, whether known or unknown, arising from, based on, or in any way relating to the distribution and exploitation through September 30, 1992 of the motion pictures . . ." produced pursuant to the various distribution agreements. The release included the 1993 audit, and the accountings and payments that were made or should have been made through September 30, 1992. The parties agreed to the future use of the same accounting practices that had been used by WB in accounting to respondents through September 30, 1992.

Paragraph 6(d) of the settlement agreement provided: "Each Party warrants and represents that it shall forever refrain from prosecuting any proceedings against any other Party, based on, arising out of, or in connection with any claim released hereby." They agreed to hold each other harmless for any breach of the agreement, "including to the extent of reasonable attorneys' fees." Disputes arising under the settlement agreement were to be resolved by binding arbitration.

Respondents conducted another audit in 2002, which allegedly revealed breaches of WB's distribution agreements with respondents. The audit also revealed inaccuracies in the accounting of revenues for Blade Runner, leading to misrepresentations regarding its profitability. After the 2002 audit, the parties engaged in new settlement discussions, and WB changed the accounting on Blade Runner to conform more closely to the methodology suggested by respondents' auditor. After this adjustment, the Blade Runner accounting changed from nearly $20 million in losses to more than $8 million in profits. WB subsequently paid respondents several hundred thousand dollars of profit participation for Blade Runner. Respondents allegedly discovered other irregularities through the 2002 audit. Among these was that in distributing respondents' motion pictures, WB had undervalued them.

Respondents filed an action against WB on July 31, 2003 (*Alan Ladd, Jr., et al. v. Warner Bros. Entertainment Inc*. (Super. Ct. L.A. County, No. BC 300043); the underlying action).[1] WB filed demurrers to the complaint and to the three subsequent amended complaints. Claims related to Blade Runner were included in each version of respondents' complaint. WB conducted depositions, propounded and responded to written discovery, and filed a motion for summary adjudication. The parties participated in court-ordered mediation and status conferences. WB filed numerous pretrial motions, including a motion in limine directed exclusively at the Blade Runner claims.

Jury trial in the underlying action began on July 9, 2007, almost four years after the original complaint was filed. Respondents rested their case on July 19, 2007, and WB moved for nonsuit the following day. The court granted WB's motion in part, ruling that the 1996 settlement agreement barred respondents from seeking damages based on the

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[1] We denied appellant's request for judicial notice of the complaint and answer in the underlying action because these pleadings were not before the trial court in this case. We rely on the allegations in the petition to compel arbitration, and on the declaration of respondents' counsel, filed in opposition to the motion to compel arbitration, for our description of the proceedings in the underlying action. WB filed objections to this declaration in the trial court, but failed to obtain a ruling on its objections. "Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

accounting aspects of the Blade Runner claims. The court ruled that respondents could proceed on their claim that WB had underallocated value to Blade Runner when WB licensed the film. Trial continued, and WB rested its case on July 26.

On July 27, 2007, WB sent respondents' counsel a letter demanding—for the first time—that the Blade Runner claims be arbitrated. WB continued to participate in the trial by delivering its closing argument. On August 2, 2007, the jury returned a verdict in respondents' favor for over $3 million dollars and found that WB had underallocated the license fees for respondents' films, including Blade Runner, in the amount of $97,257,000.

On September 7, 2007, WB sent respondents' counsel another letter demanding arbitration. In a telephone conversation, respondents' counsel informed WB that it would not agree to arbitrate any claims because all claims had been litigated and resolved.

On October 9, 2007, WB filed four motions for judgment notwithstanding the verdict. The court denied the motions on November 19. Respondents filed their notice of appeal in the underlying action on November 26, 2007. On December 14, 2007, WB filed its notice of cross-appeal in the underlying action. That appeal (No. B204015) is still pending.

Meanwhile, on December 12, 2007, WB filed this action, seeking to compel arbitration. Respondents opposed the petition, and on April 25, 2008, the court denied the petition, ruling: "Having engaged in extensive, merits litigation in the Prior Action, including a lengthy trial, and having failed to petition for arbitration during those proceedings, Warner waived its right to arbitrate the matters advanced in this action." The denial was without prejudice to WB's ability to renew its petition upon conclusion of the appellate proceedings in the underlying action. WB appeals from this order.

DISCUSSION

Under Code of Civil Procedure section 1281.2,[2] on petition of a party to an arbitration agreement, if the court determines that an agreement to arbitrate a controversy exists, it shall order the petitioner and the respondent to arbitrate the controversy unless it determines that the right to compel arbitration has been waived by the petitioner. (§ 1281.2, subd. (a).) "[N]o single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195.) Relevant factors to be considered include: """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."' (*Sobremonte v. Superior Court* [(1998)] 61 Cal.App.4th [980, 992], quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467-468.)" (*St. Agnes Medical Center v. PacifiCare of California, supra,* 31 Cal.4th at p. 1196.)

WB acknowledges that these factors "**would** be relevant, and without question **would** demonstrate waiver, ***if*** Warner was attempting to circumvent the prior court action and arbitrate claims at-issue in that case." But WB's position is that it is not seeking to arbitrate the same claims that were litigated in the underlying action. It is this threshold question which we must resolve.

In its petition to compel arbitration, WB asserted that in the underlying action, respondents alleged that the film Blade Runner "was running at a deficit because Warner

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[2] All statutory references are to this code unless otherwise indicated.

improperly had accounted for the film's Negative Cost and had overstated Interest on Negative Cost; respondents further alleged that Warner committed fraud by misrepresenting and/or concealing the true amount of Negative Cost for the film (collectively, the '*Blade Runner* Claim')." WB alleged that it used the same accounting methodology and practices with respect to Blade Runner both prior to and after the September 30, 1992 release date in the 1996 settlement agreement.

According to the petition, "Prior to and during trial Warner defended against the *Blade Runner* Claim on the basis that the Claim was barred by the Settlement Agreement, specifically: (1) because Warner had employed the challenged accounting methodology and practices for *Blade Runner* prior to September 30, 1992, Respondents had released any claim based on those practices and had consented to Warner continuing to use them after September 30, 1992; and (2) Warner did not make any fraudulent representations or omissions which would enable Respondents to avoid the release and consent provisions of the Settlement Agreement with respect to *Blade Runner*." At the close of respondents' case during trial, "Warner moved for nonsuit on the *Blade Runner* Claim. The trial court granted Warner's motion, ruling that Warner had not committed fraud and that the release in the Settlement Agreement barred the *Blade Runner* Claim."

WB then alleged: "By asserting and prosecuting the *Blade Runner* Claim in the Action, Respondents breached, among other provisions, the representation and warranty in Paragraph 6(d) of the Settlement Agreement that they 'shall forever refrain from prosecuting any proceedings against any other Party, based on, arising out of, or in connection with any claim released hereby.' As a result of Respondents' breach, Warner is entitled to recover the reasonable attorney fees it incurred in defending against the *Blade Runner* Claim pursuant to Paragraph 6(e) of the Settlement Agreement."

WB's theory is that under the 1996 settlement agreement, respondents released "all claims, whether known or unknown, arising from, based on, or in any way relating to" the Blade Runner accounting, *and* promised not to prosecute any action arising out of the released claim. WB asserted the release in support of its motion for nonsuit, and now attempts to assert the promise not to prosecute the released claim as a separate breach of

contract claim for which it is entitled to recover attorney fees. But these are two aspects of the same contractual promise, arising from the same conduct, the filing of the underlying action alleging improprieties in the Blade Runner accounting. "[T]he distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, . . ." (*Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 711; see also *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 298.) If, as WB successfully asserted in its motion for nonsuit, respondents had released the very same Blade Runner accounting claims they were asserting in the underlying litigation, then respondents by that very same conduct also breached their promise to refrain from prosecuting any released claims.

Under section 426.30, "[I]f a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded."[3] "For purposes of determining whether a cause of action must be alleged in a cross-complaint, a 'related cause of action' is 'a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.' (§ 426.10, subd. (c).)" (*K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 498.)

In the underlying action, respondents alleged deficiencies in the accounting methodology utilized with regard to the film Blade Runner. The 1996 settlement agreement had resolved the Blade Runner accounting methodology, retrospectively and prospectively, including a release and promise not to prosecute any claim with regard to the accounting. To the extent these provisions of the settlement agreement provided a defense to a Blade Runner accounting claim and provided for recovery of attorney fees incurred because of a breach of these provisions, they arose "out of the same transaction,

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[3] There are exceptions to this compulsory cross-complaint requirement (see §§ 426.30, subd. (b), 426.40, 426.60), but none applies here.

. . . or series of transactions . . . as the cause of action which the plaintiff allege[d] in his complaint." (§ 426.10, subd. (c).) WB was required to assert in the underlying action both its defensive claims based on the release in the settlement agreement, and its claim for affirmative relief based on respondents' related obligation to hold WB harmless for the claimed breach of the settlement agreement, including attorney fees incurred because of the breach. It was not entitled to file a new action for recovery of damages caused by the filing of the underlying litigation.

WB's attempt to proceed in a separate action for breach of the settlement agreement is akin to splitting a cause of action. There was only one allegedly wrongful act underlying WB's claim: respondents prosecuted an action against WB for the Blade Runner claims that had been released under the 1996 settlement agreement. The fact that this conduct gave rise to two theories of relief, one a defense to the Blade Runner claims, the other a right to recover attorney fees for the wrongful assertion of released claims, does not alter the fact that all relief arises from breach of the same contract by the same conduct. (See *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 915.) There was but one primary right at issue, and resolution of that right by grant of nonsuit in the underlying action precludes assertion of the same claim in arbitration on a different legal theory or for different relief. (*Id.* at p. 913.) The trial court properly denied the petition to compel arbitration.

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Respondents are to have their costs on appeal.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.